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UTILITIES COMMISSION

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Attorneys for Complainant Thompson River Co-Gen, LLC

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

THOMPSON RIVER CO-GEN, LLC, a	)	
Colorado Company	)	CASE NO. AVU-E-05-7
	)	
Complainant,	)	REPLY COMMENTS
vs.	)	
	)	OF
AVISTA CORPORATION, dba,	)	
Avista Utilities,	)	THOMPSON RIVER
a Washington Corporation,	)	CO-GEN
	)	
Respondent	)	
_____	)	

**COMES NOW**, Thompson River Co-Gen, LLC, (hereinafter "TRC"), by and through their attorneys and hereby provides its Reply Comments to the various comments filed in response to that Notice of Modified Procedure issued by the Secretary of the Commission on September 7, 2006.

## BACKGROUND

This case began with a complaint filed by TRC against Avista and, concluded, or so it was hoped, with a compromise settlement and a final power purchase agreement that was filed for approval with this Commission on August 30, 2006. The compromise settled the outstanding power purchase and contract issues between Avista and TRC such that the two parties were able to file a Joint Petition for its approval. TRC appreciates the efforts of the Commission's Staff in assisting the process such that a power purchase agreement was successfully negotiated and filed for ultimate approval.

The Commission Staff recommended that the agreement be approved as filed noting that:

The power purchase rate was negotiated as a compromise to resolve the contract dispute between the parties. Staff believes that the negotiated rate is reasonable, and represents a fair compromise. The rate is less than the published avoided cost rate, but greater than the rate computed by the Company under the IRP methodology.

Other terms of the Agreement represent a settlement of "other potential issues of dispute." Staff has reviewed the Agreement and believes that the contract terms are reasonable, within the scope of items Staff

believes should be negotiable, and not in violation of any prior Commission orders.

Staff Comments, p. 3-4.

Staff's Comments ought to have been the last word in this docket, but for the Commission's order approving the contract. Unfortunately, that is not now the case.

The parties in this case have proceeded under routine Commission procedures, including IPUC Staff hosted settlement conferences, and now seek approval of the resulting power purchase agreement based on the Commission's specific jurisdictional powers. Avista and TRC jointly filed the petition for approval of the contract. The Commission Staff was kept apprised of negotiations and assisted the parties at times in getting issues resolved. It appeared that all would proceed smoothly. Indeed, proceeding smoothly is vitally important to TRC as it is under critical deadlines to complete various construction projects in order to meet revised air quality and other permits. TRC has properly followed all of the IPUC protocol, including the execution of a standard PPA providing for ongoing protection of permit and PURPA qualifications. Further delay of approval is costly to TRC and completely unwarranted. Therefore, TRC was dismayed to see a flurry of baseless, inflammatory and extra-jurisdictional comments filed in response to the Commission's notice of modified procedure in this matter. TRC offers the following response to the comments filed in this docket:

1. Comments on Environmental Issues are Beyond the Scope of the Commission's Jurisdiction

Most of the public comments received by the Commission address the potential environmental, social, health, and economic effects (collectively

“societal impacts”) of the construction of TRC’s facility. As the Commission is aware, the TRC plant is located in Montana – not Idaho. Therefore, even if this Commission had subject matter authority over societal impacts, it is in the wrong state in which to assert such authority.

As this Commission noted in the Garnett Certificate of Public Convenience and Necessity proceeding:

The Commission notes that the Commission’s jurisdiction is statutory. Reference Idaho Code, Title 61. This Commission is not the forum to bring facility siting and related environmental issues.

Case No. IPC-E-01-42, Order No. 28932, p. 3 (2002).

The Commission’s limited jurisdiction is established by a long line of Supreme Court Cases:

The Idaho Public Utilities Commission has no authority other than that given to it by the legislature. It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction. *United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977); *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 571 P.2d 753 (1977); *Arrow Transp. Co. v. Idaho Public Utilities Comm’n*, 85 Idaho 307, 379 P.2d 422 (1963). As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and compliance is not had with the statutes, no jurisdiction exists. *Arrow Transp. Co. v. Idaho Public Utilities Comm’n, supra*.

*Washington Water Power Co. v. Kootenai Environmental Alliance* 99 Idaho 875, 879, 591 P.2d 122 (1979).

Enforcement of air quality, water quality, water use rights, land use, or any other type of environmental or regulatory permit is not found anywhere in Title 61 of the Idaho Code. That fact may be why none of the commenters have cited even a single authority suggesting that this Commission has such expansive jurisdiction. Fantastically, these commenters not only want the PUC to grant itself wide subject matter jurisdiction, they deem the Commission to have long arm jurisdiction such that it may usurp the very sovereignty of the State of Montana. Montana has the right and the obligation to protect its citizens, and the Montana Department of Environmental Quality (“MTDEQ”) has provided due process and such protections.

The above notwithstanding, TRC takes offense at the suggestion that its facility is somehow environmentally deficient. TRC has received an air quality permit under the specific and rigorous protocols and jurisdiction of the Montana Department of Environmental Quality. The TRC project will be one of the most environmentally friendly co-fired generation facilities in the WECC. TRC remains committed to being an environmentally conscious member of the community. In fact, the decision to temporarily cease operations in favor of a collaborative process with the Montana Department of Environmental Quality and all interested stakeholders demonstrates TRC’s commitment to the community and compliance with the most stringent environmental standards of any co-fired

thermal generating facility in the Northwest. TRC has proposed a complete re-design, utilizing the best available control technology for the emission systems, as well as a coordinated start-up and shut down procedure as part of the final air permit, which was issued by the MTDEQ on September 6, 2006. TRC will continue to respect the community in which it operates and honor the jurisdictional review of the MTDEQ.

3. Avoided Cost Rates are Not at Issue in this Docket

One commenter suggested that the rates “as proposed in the settlement warrant a public discussion before the Commission.” NW Energy Coalition (NVEC) at p. 1. The rates in the power purchase agreement are significantly lower than the published avoided cost rates which have been litigated and approved by separate order in a separate, prior, docket. This Commission’s avoided cost rates are being implemented (at a discount in favor of the ratepayers) not contested in this docket.

The NVEC’s request to have a “public discussion” of this Commission’s avoided cost rates is so vague and non-specific as to be meaningless. This Commission’s rules require commenters to a notice of modified procedure to actually state “the reasons” for their comments. A ‘belief’ that there should be a “public discussion” of the rates is hardly a “reason for the protest, comment or support” as required by Rule 203 of the Commission’s Rules of Procedure. This is

true of many of the comments received by those submitting comments in this docket.

4. TRC's QF Status is Not at Issue in this Case

One commenter implied that TRC's QF status is in doubt by asserting "this facility is barely a cogen at all." Women's Voices for the Earth ("WVE") at p. 3. Avista and the Commission Staff have reviewed the proposed operating characteristics of the facility in detail. Avista has physically inspected the location and steam host facility. The facility's drawings, plans, blueprints, operating plans, and one-line diagrams have been poured over by all parties to this case. Indeed, the very status of TRC as a QF has never been even an issue of discussion, let alone an issue that must be litigated before this Commission. Staff's Comments make it clear that the status of TRC as a QF was not at issue. Staff notes, almost in passing, "TRC is a Montana corporation that operates a thermal wood waste/coal generation facility." Staff Comments at p. 2. Staff also observed, "TRC is a cogeneration facility located in Thompson Falls, Montana." *Id.* WVE's naked assertions that this topping cycle cogeneration facility that meets FERC's fuel use criteria and efficiency standards pursuant to 18 C.F.R. 292.205(a)(1) as being "barely a cogen" are baseless. FERC maintains jurisdiction of PURPA qualification and has issued specific guidelines for the qualification of topping cycle cogeneration. Furthermore, the power purchase agreement provides ongoing

protections for Avista's ratepayers if TRC fails to maintain QF status.<sup>1</sup> Having failed to offer even a scintilla of a factual assertion to support its assertion, WVE expects this Commission to abandon its statutory obligations under PURPA and the Idaho Code by allowing them to champion their cause in the wrong jurisdiction. The Commission should summarily decline the invitation to adopt such an extra-jurisdictional sojourn. The Commission should do as it has done with the scores of PURPA agreements it has approved to date, approve the contract pursuant to modified procedure.

5. Permits are Not a Prerequisite to Contract

Several commenters suggested that TRC has not "fully secured all the permits it needs to operate." WVE p. 3. TRC does not need to address the substance of such claims because permits are not a prerequisite to the execution and approval a PURPA power purchase agreement. Specifically, the PPA follows IPUC-approved standards by requesting a demonstration of all valid permits prior

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<sup>1</sup> **3.2 Qualifying Facility Status.** Project Developer warrants that the Facility is a "Qualifying Facility", as that term is used and defined in 18 CFR §292.207. After initial qualification, Project Developer shall take such steps as may be required to adequately maintain the Facility's Qualifying Facility status during the term of this Agreement, and Project Developer's failure to adequately maintain Qualifying Facility status will be a material breach of or default under this Agreement. Avista reserves the right to review the Project Developer's Qualifying Facility status and associated support and compliance documents at any time during the term of this Agreement.

to commercial operation (not execution and approval).<sup>2</sup> This provision protects the ratepayers and is standard and is a requirement that is in all of the over 100 PURPA contracts previously approved by this Commission. Indeed, it would be foolish to invest substantial dollars in obtaining some permits and authorizations before one knew if one had an enforceable power purchase agreement backing up such investments.

6. Relationship to Thermal Host

TRC appreciates the Comments filed by its thermal host Thompson River Lumber (“TRL”). As the host to TRC’s cogeneration facility it is helpful for TRL to point out that the Commission’s Notice of Modified Procedure observed that all of the output from the facility will be sold to Avista, while in fact, the clear intent of the agreement and purpose of the host relationship provides for a small portion of the output to be sold to TRL. The parties, including Staff, are aware of this provision and it is simply a wording issue that all “wholesale energy output” will be sold to Avista. The reason for stating that all wholesale energy will be sold to Avista is to ensure that Avista maintains the rights to the entire net output of the

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<sup>2</sup> **4.1 Licenses, Permits and Approvals.** Project Developer shall have submitted proof to Avista that all licenses, permits or approvals necessary for Project Developer's operations have been obtained from applicable federal, state or local authorities, including, but not limited to, evidence of compliance with Subpart B, 18 CFR 292.207.

facility, once the energy from TRC enters into the high voltage transmission system. The phrase “Net Available Output” is a defined term in the Agreement.<sup>3</sup>

Thus, this clarification by TRL is not an issue of concern to the Commission in its approval of the agreement. As demonstrated by TRL’s comments, the relationship between TRL and TRC is an arms length contractual relationship. Furthermore the steam (and energy) sales, which support the co-generation qualification are of (economic and operational) interest to the steam host. While the nature and details of that relationship may be beyond the reach of this Commission, it should be apparent from TRL’s comments that there are no current issues that may impact TRC’s ability to deliver the amount of power it has contracted to deliver to Avista. Indeed, TRL’s comments ought to give the Commission comfort that all of the interested entities are actively engaged in this process. TRL does not maintain a relationship with Avista and therefore wanted to clarify that regardless of the relationship between Avista and TRC, TRL retained its the contracted rights to the steam and a small amount of energy output of the facility, in the first instance. Second, since the PPA provides “step in rights” protection provision for Avista, TRL correctly clarifies that the project site (land) is leased to TRC by TRL under a long-term lease. In the unlikely event of a

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<sup>3</sup> **1.14** “**Net Available Output**” means all electric energy generated by the Facility, net of Facility Service Power, net of power delivered to Thompson River Lumber Company, an

default, Avista can elect to “step in” and operate the TRC project, but the land will continue to be owned by TRL.

Dated this 12<sup>th</sup> day of October 2006.

RICHARDSON & O’LEARY PLLC

By: 

Peter J. Richardson, ISB #3195  
Mike Uda  
Attorneys for Thompson River  
Co-Gen, LLC

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adjacent separately owned business, net of transformation losses.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of October, 2006, the REPLY COMMENTS BY THOMPSON RIVER CO-GEN, LLC, was sent to the following parties as shown:

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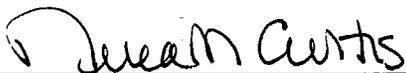
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Signed   
Nina M. Curtis